



# **Policy Monitoring Review of Jim Wells County's Indigent Defense Systems**

**November 2019**



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## **Purpose of the Policy Monitoring Review**

The Texas Indigent Defense Commission (TIDC) conducts on-site reviews to promote local compliance with the Fair Defense Act (FDA) and to provide technical assistance for improving county indigent defense processes.<sup>1</sup> Additionally, the review process aims to assist local jurisdictions in developing procedures to monitor their own compliance with their indigent defense plans and the FDA.

## **Overview**

The FDA provides a statutory framework for the appointment of counsel and sets timeframes for receiving, transmitting, and ruling upon requests for counsel. Jurisdictions retain latitude to develop the standards by which they determine indigence and appoint counsel. In odd-numbered years, counties are responsible for submitting to TIDC their local formal and informal rules related to the appointment of counsel.<sup>2</sup> This review assesses whether Jim Wells County's local practices and procedures meet the FDA's requirements and TIDC's rules. TIDC compares the FDA's core requirements<sup>3</sup> to the county's practices in the following areas:

- 1: Conduct prompt and accurate Article 15.17 proceedings
- 2: Determine indigence according to standards directed by the indigent defense plan
- 3: Establish minimum attorney qualifications
- 4: Appoint counsel promptly
- 5: Institute a fair, neutral, and nondiscriminatory attorney selection process
- 6: Report data required by statute

TIDC staff, Kathleen Casey-Gamez and Joel Lieurance, made an on-site review of Jim Wells County in May 2019. The primary source of information for this report came from sample felony, misdemeanor and juvenile cases filed during FY2018 (October 2017 – September 2018). TIDC observed a misdemeanor and a juvenile docket, as well as magistrate warnings. TIDC interviewed criminal defense attorneys, court staff, jail staff, and the statutory county court judge. Other useful information included the Indigent Defense Expense Report (IDER), local indigent defense plans, monthly reports submitted to the Office of Court Administration (OCA), and attorney appointment lists and proof of eligibility for those lists.

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<sup>1</sup> TEX. GOV'T CODE § 79.037(a)–(b); Title 1 TEX. ADMIN. CODE § 174.28.

<sup>2</sup> TEX. GOV'T CODE § 79.036(a)(1).

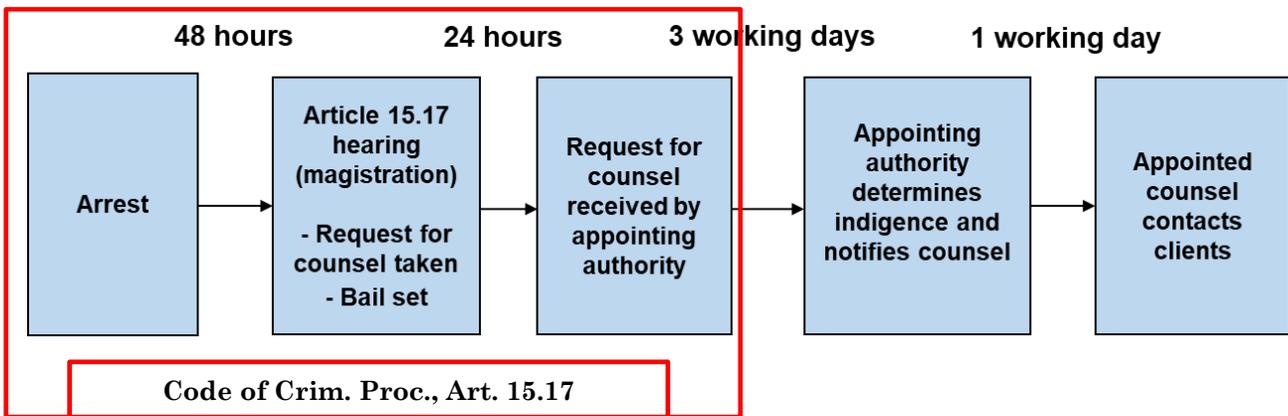
<sup>3</sup> Title 1 TEX. ADMIN. CODE § 174.28(c).

## Program Assessment

### **REQUIREMENT 1: CONDUCT PROMPT AND ACCURATE ARTICLE 15.17 PROCEEDINGS**

A person must be brought before a magistrate within 48 hours of arrest.<sup>4</sup> At this hearing, the magistrate must inform the arrestee of his or her right to counsel; inform the arrestee of the procedures for requesting counsel; and ensure the arrestee has reasonable assistance in completing the necessary forms for requesting assistance of counsel.<sup>5</sup> Within 24 hours of receiving a request for counsel, the magistrate must transmit this request to the appointing authority.<sup>6</sup>

**Figure 1a: Timeline for Appointment of Counsel in Adult Criminal Cases**



### ***Timeliness of Warnings***

A county is presumed to be in substantial compliance with the prompt magistration requirement if at least 98% of Article 15.17 hearings sampled are conducted within 48 hours of arrest.<sup>7</sup> To determine the timeliness of Article 15.17 warnings in Jim Wells County, TIDC calculated the number of days between arrest and the Article 15.17 hearing for 84 cases. Magistrate warnings occurred within two days of arrest for all sample cases, indicating that Jim Wells County has processes in place to promptly bring arrestees before a magistrate.

<sup>4</sup> TEX. CODE CRIM. PROC. art. 15.17(a).

<sup>5</sup> *Id.*

<sup>6</sup> *Id.*

<sup>7</sup> 1 Tex. Admin. Code § 174.28. If the hearing occurred within two days of arrest, the monitor presumed warnings were timely.

**Table 1: Timeliness of Article 15.17 Hearings**

	<b>Sample Size</b>	<b>Percent</b>
Article 15.17 hearing occurs x days after arrest:	84	—
0 days	41	48.8%
1 day	42	50.0%
2 days	1	1.2%
<b>Timely Hearings</b>	<b>84</b>	<b>100.0%</b>
More than 2 days	0	0%

***Texas Judicial Council Monthly Court Activity Reports and the Ability of Arrestees to Request Counsel***

Under Articles 15.17 (a) and (e) of the Code of Criminal Procedure, the magistrate must ask the arrestee whether he or she would like to request counsel and make a record of the request. Justices of the peace and municipal court judges are required to submit monthly reports to the Office of Court Administration (OCA), documenting the number of Article 15.17 hearings conducted and the number of requests for counsel from these hearings.<sup>8</sup> Statewide, when justice courts conducted magistrate warnings, counsel was reportedly requested in 32% of misdemeanor warnings and 38% of felony warnings.<sup>9</sup> Comparatively, some totals reported by justices of the peace from Jim Wells County were below statewide request rates (see Table 2). Case file samples, staff observations, and data reports, indicate that arrestees are able to request counsel at the Article 15.17 hearing, but for most justice courts, the request rate is lower than the state average.

**Table 2: Judicial Council Monthly Activity Reports (Oct. 2017 – Sept. 2018)**

<b>Article 15.17 Hearing Data Reported by Justice Courts</b>	JP1	JP3	JP4	JP5	JP6	Total
Misdemeanor Warnings (A & B)	262	0	0	71	604	937
Misdemeanor Requests for Counsel (A & B)	23	1	0	1	140	165
% Misdemeanor Requests	9%	n/a	n/a	1%	23%	18%
Felony Warnings	186	0	0	50	641	877
Felony Requests for Counsel	37	3	0	0	235	275
% Felony Requests	20%	n/a	n/a	0%	37%	31%

<sup>8</sup> 1 Tex. Admin. Code § 171.7 – 8.

<sup>9</sup> Court activity may be queried from OCA’s court activity database, available at <https://www.txcourts.gov/statistics/court-activity-database/>.

***Assistance with Counsel Requests and Their Transmission to the Courts***

If an arrestee requests counsel, Article 15.17(a) requires the magistrate ensure reasonable assistance in completing the paperwork necessary to request counsel. The request must then be transmitted to the appointing authority within 24 hours. Article 15.17(a) does not require the magistrate to provide assistance with financial forms, but puts responsibility on the magistrate to ensure the assistance is provided.

According to interviews, if an arrestee requests counsel at the Article 15.17 hearing, the arrestee is given an affidavit of indigence. Upon completion of the form (which may take multiple days), the arrestee submits it to the jail’s floor officer, who notarizes it and forwards the form to the records clerk. The records clerk typically walks the affidavits of indigence to the courts once or twice per week. These practices for transmitting the affidavit of indigence go beyond the 24 hour time frame allowed by Article 15.17. Jim Wells County must put in place procedures to:

- (1) ensure arrestees receive reasonable assistance in completing financial affidavits at the time of the magistrate warnings; and
- (2) ensure the financial paperwork is promptly transmitted to the courts. If financial documents were scanned and electronically sent to the courts, transmittal issues could be addressed.

**FINDINGS AND RECOMMENDATIONS FOR REQUIREMENT 1**

**Conduct prompt and accurate magistration proceedings.**

TIDC is available as a resource to Jim Wells County in developing procedures to address this finding.

**FINDING and RECOMMENDATION 1:** Article 15.17(a) requires that magistrates ensure reasonable assistance in completing forms necessary to obtain appointed counsel. These forms must then be transmitted to the appointing authority within 24 hours. Jim Wells County magistrates must ensure counsel requests and associated financial forms are promptly completed and transmitted to the courts.

**REQUIREMENT 2: DETERMINE INDIGENCE ACCORDING TO STANDARDS DIRECTED BY THE INDIGENT DEFENSE PLAN**

Under Article 26.04(l) of the Code of Criminal Procedure, counties must adopt procedures and financial standards for determining whether a defendant is indigent. The local standards for determining indigence are set in each county’s indigent defense plans.<sup>10</sup> For adult felony and misdemeanor cases in Jim Wells County, a person is presumed indigent if:

- (1) The defendant is currently receiving food stamps, Medicaid, Temporary Assistance for Needy Families, Supplemental Security Income, or public housing;
- (2) The defendant’s current household income does not exceed 150% of the current Federal Poverty Guidelines; or
- (3) The defendant is currently serving a sentence in a correctional facility, mental health institution or other sentence.

For juveniles, the same standard is used, but indigence is based upon the income and assets of the person having custody over the juvenile.

TIDC reviewed whether indigence determination procedures in Jim Wells County comply with their indigent defense plans and the FDA.<sup>11</sup> TIDC found the County is in substantial compliance with Requirement 2.

**FINDINGS AND RECOMMENDATIONS FOR REQUIREMENT 2**

**Determination of Indigence.**

Requirement satisfied. No findings.

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<sup>10</sup> Jim Wells County has three indigent defense plans:

- A district court plan (<http://tidc.tamu.edu/IDPlan/ViewPlan.aspx?PlanID=523>);
- A county court plan (<http://tidc.tamu.edu/IDPlan/ViewPlan.aspx?PlanID=461>); and
- A juvenile board plan (<http://tidc.tamu.edu/IDPlan/ViewPlan.aspx?PlanID=494>)

<sup>11</sup> Title 1 TEX. ADMIN. CODE § 174.28(c)(2). *See also* section 1.c, above.

### **REQUIREMENT 3: ESTABLISH MINIMUM ATTORNEY QUALIFICATIONS**

Under Article 26.04(d) of the Code of Criminal Procedure, private attorneys wishing to take court appointments must apply to be on an appointment list. The list must contain objective qualifications, including a minimum annual continuing legal education (CLE) requirement of at least six hours per year in criminal or juvenile law.<sup>12</sup> Assigned counsel attorneys must be approved by a majority of judges presiding over criminal and juvenile matters. TIDC reviewed whether Jim Wells County’s appointment lists are maintained according to the requirements of their indigent defense plans.<sup>13</sup>

The Jim Wells County indigent defense plans create felony, misdemeanor, and juvenile appointment lists. The felony and misdemeanor lists require attorneys obtain at least six CLE hours in criminal law each year. The juvenile list requires attorney obtain at least six CLE hours in juvenile law each year. TIDC found the County has procedures for managing the criminal attorney appointment lists and for ensuring all attorneys on the lists meet their annual CLE requirement as described in the indigent defense plans.

#### **FINDINGS AND RECOMMENDATIONS FOR REQUIREMENT 3**

##### **Minimum Attorney Qualifications.**

Requirement satisfied. No findings.

### **REQUIREMENT 4: APPOINT COUNSEL PROMPTLY**

#### ***Adult Criminal Cases***

Article 1.051(c) of the Code of Criminal Procedure requires the court or its designee to appoint counsel by the end of the third working day following receipt of the request for counsel.<sup>14</sup> If an arrestee makes bail, Article 1.051(j) sets the deadline for appointing counsel to be the defendant’s first court appearance or the initiation of adversarial judicial proceedings, whichever comes first. *Rothgery v. Gillespie County* clarified that the initiation of adversarial judicial proceedings occurs at the Article 15.17 hearing.<sup>15</sup> Since the *Rothgery* decision, the meaning of the language from Article 1.051(j) cannot be construed to allow for a ruling on a request for counsel to be delayed because the defendant makes bail. Once adversarial judicial proceedings have been initiated, courts must provide a method for defendants to request and obtain appointed counsel.<sup>16</sup>

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<sup>12</sup> Title 1 TEX. ADMIN. CODE §§ 174.1 – 4. Attorneys may be Board Certified in criminal or juvenile law in lieu of the annual CLE requirement.

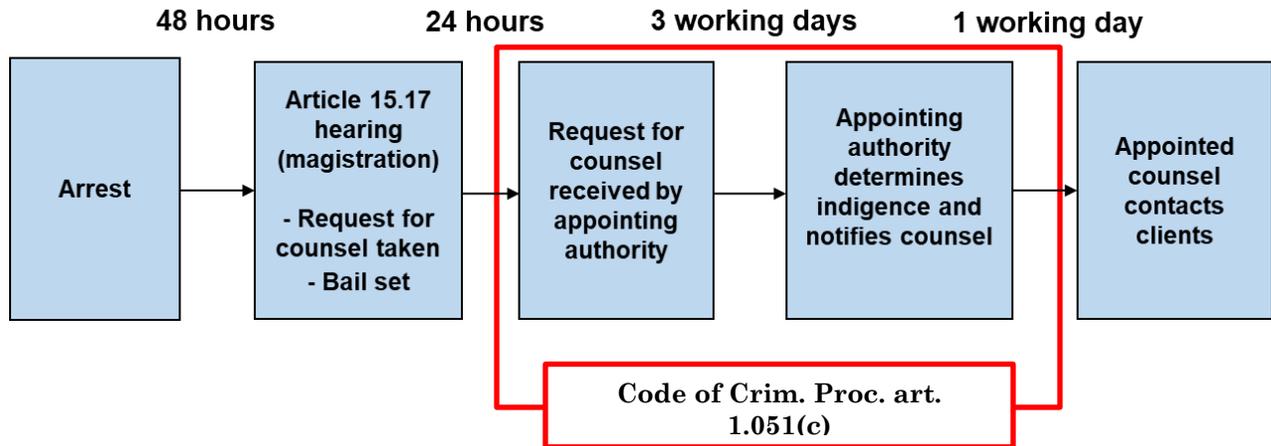
<sup>13</sup> Title 1 TEX. ADMIN. CODE § 174.28(c)(3).

<sup>14</sup> The time frame is one working day for counties with a population over 250,000.

<sup>15</sup> *Rothgery v. Gillespie County*, 554 U.S. 191, 212 – 13 (2008).

<sup>16</sup> 1 TEX. ADMIN. Code § 174.51.

**Figure 1b: Timeline for Appointment of Counsel in Adult Criminal Cases**



In Jim Wells County, defendants who request counsel in the jail are given affidavits of indigence, but there are often delays in transmitting these requests to the courts (and sometimes requests do not get to the courts). Defendants who request counsel in court typically have their requests ruled upon the same day they make the requests. Delays in appointing counsel appear to result from breakdowns in promptly transmitting requests for counsel to the courts.

***Timeliness of Appointments in Felony Cases***

To assess the timeliness of Jim Wells County’s appointment procedures in felony cases, TIDC examined the time from request for counsel to appointment or denial of indigence in 60 sample felony cases filed in FY2018 (October 2017 – September 2018). Under TIDC’s monitoring rules, a county is presumed to be in compliance with the prompt appointment of counsel requirement if at least 90% of sample indigence determinations are timely.<sup>17</sup> Counsel was appointed in a timely manner in 42 of 47 sample cases containing a request for counsel (**89% timely**), which does not meet the 90% timeliness threshold. TIDC therefore presumes that Jim Wells County is not in substantial compliance with this requirement. The district court must put in place procedures to ensure timely appointment of counsel.

<sup>17</sup> Title 1 TEX. ADMIN. CODE § 174.28(c)(4).

**Table 3: Times from Request to Appointment in Felony Cases**

	Number from Sample	Percent of Sample
Felony requests for counsel	47	
Request for counsel ruled upon in 'x' workdays		
0 workdays	38	80.9%
1 to 3 workdays + 24 hour transfer	4	8.5%
<b>Timely Rulings on Requests</b>	<b>42</b>	<b>89.4%</b>
4 to 10 workdays + 24 hour transfer	1	2.1%
More than 10 workdays	3	6.4%
No ruling on request	1	2.1%
<b>Untimely / No Rulings on Requests</b>	<b>5</b>	<b>10.6%</b>

***Timeliness of Appointments in Misdemeanor Cases***

To assess the timeliness of Jim Wells County's current appointment procedures in misdemeanor cases, TIDC staff examined 114 sample misdemeanor cases filed in FY2018 (October 2017 – September 2018). Counsel was appointed in a timely manner in 30 of 44 cases having a request for counsel (**68% timely**), which does not meet the TIDC's 90% threshold. From this sample, it appeared that if a defendant requested counsel in court, it was promptly ruled upon. If the defendant requested counsel from the jail, it was not likely to be ruled upon in a prompt manner, and the court might not even receive the request. The misdemeanor courts must put in place procedures to ensure timely appointment of counsel.

**Table 4: Times from Request to Appointment in Misdemeanor Cases**

	Number from Sample	Percent of Sample
Misdemeanor requests for counsel	44	
Request for counsel ruled upon in 'x' workdays		
0 workdays	29	65.9%
1 to 3 workdays + 24 hour transfer	1	2.3%
<b>Timely Rulings on Requests</b>	<b>30</b>	<b>68.2%</b>
4 to 10 workdays + 24 hour transfer	0	0%
More than 10 workdays	4	9.1%
No ruling on request	10	22.7%
<b>Untimely / No Rulings on Requests</b>	<b>14</b>	<b>31.8%</b>

### ***Waivers of Counsel in Misdemeanor Cases***

Article 1.051 governs the right to counsel. In pertinent part, Article 1.051(f-2) states the following:

In any adversary judicial proceeding that may result in punishment by confinement, the court may not direct or encourage the defendant to communicate with the attorney representing the state until the court advises the defendant of the right to counsel and the procedure for requesting appointed counsel and the defendant has been given a reasonable opportunity to request appointed counsel. If the defendant has requested appointed counsel, the court may not direct or encourage the defendant to communicate with the attorney representing the state unless the court or the court's designee authorized under Article 26.04 to appoint counsel for indigent defendants in the county has denied the request and, subsequent to the denial, the defendant:

- (1) Has been given a reasonable opportunity to retain and has failed to retain private counsel; or
- (2) Waives or has waived the opportunity to retain private counsel.

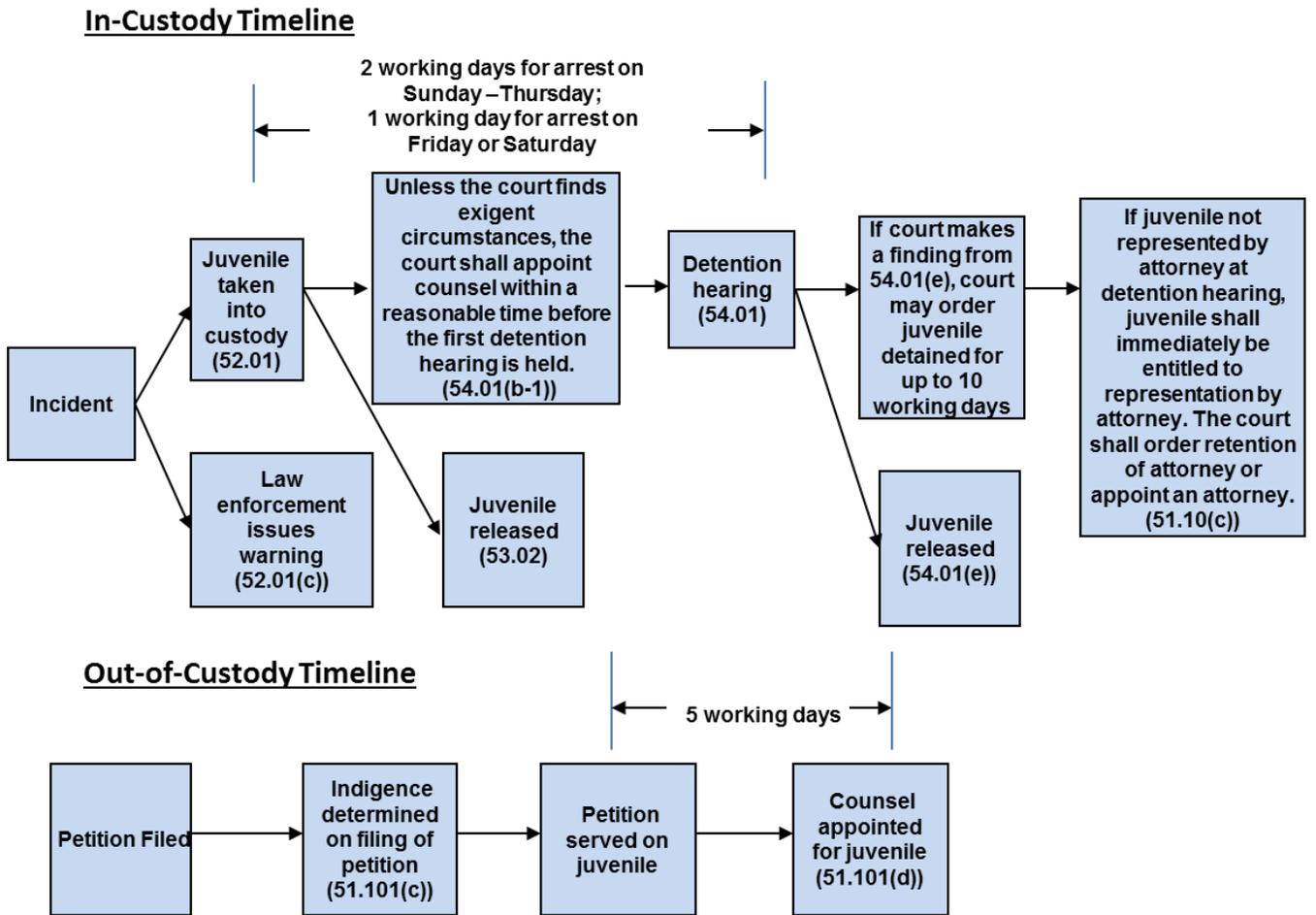
The court hearing misdemeanor cases failed to rule on a defendant's request for counsel in 10 sample misdemeanor cases. For seven of these cases, defendants later entered uncounseled pleas. The absence of a ruling on a pending counsel request raises the possibility of several statutory violations, including untimeliness (Art. 1.051(c)) and invalid waiver (Art. 1.051(f-2)). Jim Wells County must ensure that its procedures for ruling on counsel requests meet the requirements of both Article 1.051(c) and 1.051(f-2).

### ***Juvenile Cases***

Counsel must be appointed for juveniles alleged to have engaged in delinquent conduct when the juvenile is brought to a detention hearing and when the juvenile is served with a copy of the petition alleging misconduct. Under Section 54.01(b-1) of the Family Code, unless the court finds the appointment of counsel is not feasible due to exigent circumstances, the court shall appoint counsel within a reasonable time before the first detention hearing. Under Subsections 51.101(c) and (d) of the Family Code, once a petition is served on the juvenile, the court has five working days to appoint counsel or order the retention of counsel for the juvenile.

In Jim Wells County, juveniles are brought to a detention hearing once the prosecutor becomes aware that a charge may be filed against the juvenile. Counsel is appointed for indigent juveniles at this hearing. Most juveniles are released from detention, and the attorney remains with the case until case disposition. For many low-level offenses, the purpose of the hearing is not to detain the juvenile, but rather to create an attorney-client relationship at an early stage. This process ensures that all indigent juveniles will receive timely appointment of counsel.

**Figure 2: Timeline for Appointment of Counsel in Juvenile Cases**



To assess the timeliness of Jim Wells County’s appointment procedures in juvenile cases, TIDC staff examined 26 cases filed in FY2018 (October 2017 – September 2018). Because separate time frames exist for the appointment of counsel at detention hearings and when the child is served with a petition, TIDC makes two separate analyses.

***Juvenile Detention Hearings***

Section 54.01(b-1) of the Family Code requires counsel be appointed prior to the initial detention hearing, unless appointment is not feasible due to exigent circumstances.<sup>18</sup> All 26 sample cases contained a detention hearing. Counsel was present for the initial detention hearing in all but one sample case. In the other case,

<sup>18</sup> Tex. Fam. Code §54.01(b-1) states:

Unless the court finds that the appointment of counsel is not feasible due to exigent circumstances, the court shall appoint counsel within a reasonable time before the first detention hearing is held to represent the child at that hearing.

counsel was not present for the hearing, but was appointed on the same day as the hearing. This juvenile was released from detention that same day. TIDC considers this case to be one of exigent circumstances in which the court could not appoint counsel prior to the hearing.<sup>19</sup> This level of timeliness (**100% timely**) meets TIDC’s 90% threshold.

***Appointment After Service of the Petition***

Under Subsections 51.101(c) and (d) of the Family Code, once a petition is served on the juvenile, the court has five working days to appoint counsel or order the retention of counsel for the juvenile. Counsel was present within five working days of petition service for all four sample cases involving the service of a petition on the juvenile. This level of timeliness (**100% timely**) meets TIDC’s 90% threshold.

**Table 5: Times to Appointment in Juvenile Cases**

	Sample Size	Number from Sample	Percent
Total juvenile cases examined	26		
<b>TIMELINESS OF COUNSEL APPOINTMENTS FOR DETENTION HEARINGS</b>			
Case files with detention hearings	26		
Cases with attorney present at initial hearing		25	96.2%
Cases of exigent circumstances in which counsel must be appointed if the juvenile is detained		1	3.8%
<b>Total cases with timely presence of counsel</b>		<b>26</b>	<b>100%</b>
<b>TIMELINESS OF COUNSEL APPOINTMENTS WHERE JUVENILE SERVED WITH A PETITION</b>			
Case files in which juvenile served with a petition	4		
Counsel appointed within 5 working days of service		4	
Counsel retained within 5 working days of service		0	
Indigence denied within 5 working days of service <sup>20</sup>		0	
<b>Total cases with timely presence of counsel</b>		<b>4</b>	<b>100%</b>

<sup>19</sup> TIDC considered this case to be one of exigent circumstances because the purpose of the hearing for low-level offenses is to appoint counsel, not to detain the juvenile. In this instance, the juvenile was released from custody and an attorney was appointed at the hearing.

<sup>20</sup> TIDC considered a denial of indigence to be synonymous with an order to retain counsel.

## FINDINGS AND RECOMMENDATIONS FOR REQUIREMENT 4

### **Prompt Appointment**

TIDC is available as a resource to Jim Wells County in developing procedures to address these findings.

**FINDING and RECOMMENDATION 2 (felony cases):** Article 1.051(c)(1) requires the court (or its designee) to rule on all requests for counsel within three working days (plus 24 hours allowed for transferring requests to the courts) of the request being made. The sample of attorney appointments in felony cases fell below TIDC's 90% timely threshold for presuming a jurisdiction's appointment system ensures timely appointment of counsel. The County must implement practices that satisfy Article 1.051(c)(1)'s timeline in felony cases.

**FINDING and RECOMMENDATION 3 (misdemeanor cases):** Article 1.051(c)(1) requires the court (or its designee) to rule on all requests for counsel within three working days (plus 24 hours allowed for transferring requests to the courts) of the request being made. The sample of attorney appointments in misdemeanor cases fell below TIDC's 90% timely threshold for presuming a jurisdiction's appointment system ensures timely appointment of counsel. The County must implement practices that satisfy Article 1.051(c)(1)'s appointment timeline in misdemeanor cases.

**FINDING and RECOMMENDATION 4 (misdemeanor cases):** The absence of a ruling on 10 sample misdemeanor requests for counsel raises the possibility of several statutory violations, including untimeliness (Art. 1.051(c)) and invalid waiver (Art. 1.051(f-2)). Jim Wells County must ensure that its procedures for ruling on counsel requests meet the requirements of both Article 1.051(c) and 1.051(f-2).

## **REQUIREMENT 5: INSTITUTE A FAIR, NEUTRAL, AND NONDISCRIMINATORY ATTORNEY SELECTION PROCESS**

Article 26.04(b)(6) of the Code of Criminal Procedure requires that local procedures for appointing counsel ensure appointments are allocated among qualified attorneys in a fair, neutral, and nondiscriminatory manner. TIDC presumes a jurisdiction has a fair, neutral, and nondiscriminatory appointment system if (for assigned counsel and managed assigned counsel systems) the top 10% of attorneys receiving cases at a given level (felony, misdemeanor, and juvenile) receive no more than three times their respective share of appointments. If a county can track appointments by appointment list, this analysis is made on each appointment list. A county can overcome the presumption by providing evidence as to why the system is fair, neutral, and nondiscriminatory.

Jim Wells County uses rotational systems of appointment for felony, misdemeanor, and juvenile appointments. Under the rotational system, the court

appoints the attorney who is next on the appointment wheel, and once an appointment is received, the attorney moves to the bottom of the list.

TIDC analyzed the distribution of attorney appointments by case level during FY2018. TIDC attempts to consider only those attorneys who were on the appointment list for the entire year. TIDC did not analyze the distribution of misdemeanor cases paid as misdemeanor totals reported to TIDC were not accurate (see the fiscal report for more details). Based on this analysis, both felony cases and juvenile cases had distributions in which the top ten percent of appointed attorneys received less than 3.0 times their respective share of cases paid, indicating they both comply with this requirement.

**Table 8: Share of Cases Paid to Top 10% of Attorneys in Jim Wells County in FY 2018**

Level	Attorneys on List <sup>21</sup>	Top 10% Attorneys <sup>22</sup>	Respective Share of Cases <sup>23</sup> [Column A]	Actual Share of Cases [Column B]	Top 10% Received 'x' Times Their Respective Share [Col. B] / [Col. A]
Felony	7	1	14.3%	21.0%	<b>1.5</b>
Juvenile	8	1	12.4%	25.7%	<b>2.1</b>

**FINDINGS AND RECOMMENDATIONS FOR REQUIREMENT 5**

**Attorney Selection Process**

Requirement satisfied. No findings.

**REQUIREMENT 6: REPORT DATA REQUIRED BY STATUTE**

Under Section 79.036(e) of the Texas Government Code, the county auditor (or other person designated by the commissioners' court) must annually prepare and send indigent defense data to the Commission. This data must include the total expenses for cases in which an attorney was appointed for an indigent defendant or indigent juvenile in each district court, county court, statutory county court, and appellate court. Since FY2014, financial data reports must include attorney-level information.<sup>24</sup>

<sup>21</sup> TIDC considered an attorney had been on the list for the entire year if the attorney received payment for disposing a case in FY2018 and the attorney was also on the June 2019 appointment list.

<sup>22</sup> The number Top 10% Attorneys is equal to the number of Attorneys on List for Entire Year multiplied by 0.10, rounded to the nearest whole number.

<sup>23</sup> The percent Respective Share of Cases is equal to the number of Top 10% Attorneys divided by the number of Attorneys on List for Entire Year.

<sup>24</sup> TEX. GOV'T CODE § 79.036(a-1).

TIDC conducted a fiscal audit of Jim Wells County's indigent defense expenses and shares its findings in a separate report.

FINDINGS AND RECOMMENDATIONS FOR REQUIREMENT 6

**Statutory Data Reporting**

Requirement satisfied. No findings.

**Conclusion**

TIDC enjoyed meeting with Jim Wells County officials and staff and appreciates their cooperation during this review. TIDC stands ready to provide any assistance the County may need in addressing the issues identified in this report.

## **Summary of Findings and Recommendations**

Jim Wells County must respond in writing how it will address each of these findings and recommendations.

**FINDING and RECOMMENDATION 1:** Article 15.17(a) requires that magistrates ensure reasonable assistance in completing forms necessary to obtain appointed counsel. These forms must then be transmitted to the appointing authority within 24 hours. Jim Wells County magistrates must ensure counsel requests and associated financial forms are promptly completed and transmitted to the courts.

**FINDING and RECOMMENDATION 2 (felony cases):** Article 1.051(c)(1) requires the court (or its designee) to rule on all requests for counsel within three working days (plus 24 hours allowed for transferring requests to the courts) of the request being made. The sample of attorney appointments in felony cases fell below TIDC's 90% timely threshold for presuming a jurisdiction's appointment system ensures timely appointment of counsel. The County must implement practices that satisfy Article 1.051(c)(1)'s timeline in felony cases.

**FINDING and RECOMMENDATION 3 (misdemeanor cases):** Article 1.051(c)(1) requires the court (or its designee) to rule on all requests for counsel within three working days (plus 24 hours allowed for transferring requests to the courts) of the request being made. The sample of attorney appointments in misdemeanor cases fell below TIDC's 90% timely threshold for presuming a jurisdiction's appointment system ensures timely appointment of counsel. The County must implement practices that satisfy Article 1.051(c)(1)'s appointment timeline in misdemeanor cases.

**FINDING and RECOMMENDATION 4 (misdemeanor cases):** The absence of a ruling on 10 sample misdemeanor requests for counsel raises the possibility of several statutory violations, including untimeliness (Art. 1.051(c)) and invalid waiver (Art. 1.051(f-2)). Jim Wells County must ensure that its procedures for ruling on counsel requests meet the requirements of both Article 1.051(c) and 1.051(f-2).

## Appendix – Monitoring Review Checklist

The monitoring review of the FDA's core requirements consisted of an examination of the items from the following checklist. If a box is marked, the specific requirement was met. If a box is not marked, the requirement either was not satisfied or is not applicable.

### REQUIREMENT 1: CONDUCT PROMPT AND ACCURATE ARTICLE 15.17 PROCEEDINGS

- The accused must be brought before a magistrate within 48 hours of arrest.<sup>25</sup>
  - A person arrested for a misdemeanor without a warrant must be released on bond in an amount no more than \$5,000 not later than 24 hours after arrest if a magistrate has not determined probable cause by that time.<sup>26</sup>
- The magistrate must inform and explain the right to counsel and the right to appointed counsel to the accused.<sup>27</sup>
- The magistrate must ensure that reasonable assistance in completing forms necessary to request counsel is provided to the accused.<sup>28</sup>

**REQUIREMENT NOT SATISFIED:** Based on interviews, there are delays in completing the affidavit of indigence.

- A record must be made of the following:
  - the magistrate informing the accused of the accused's right to request appointment of counsel;
  - the magistrate asking whether accused wants to request appointment of counsel;
  - and whether the person requested court appointed counsel.<sup>29</sup>
- If authorized to appoint counsel, the magistrate must do so within one working day after receipt of request for counsel in counties with a population of 250,000 or more and within three working days in counties under 250,000.<sup>30</sup>

**NOT APPLICABLE:** The indigent defense plan does not authorize the magistrate to appoint counsel.

- If not authorized to appoint counsel, the magistrate must transmit or cause to be transmitted to the appointing authority an accused's request for counsel within 24 hours of the request being made.<sup>31</sup>

**REQUIREMENT NOT SATISFIED:** Local procedures do not ensure that requests for counsel are promptly transmitted to the courts.

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<sup>25</sup> TEX. CODE CRIM. PROC. art. 14.06(a).

<sup>26</sup> TEX. CODE CRIM. PROC. art. 17.033.

<sup>27</sup> TEX. CODE CRIM. PROC. art. 15.17(a).

<sup>28</sup> *Id.*

<sup>29</sup> TEX. CODE CRIM. PROC. art. 15.17(e).

<sup>30</sup> *See, e.g.*, TEX. CODE CRIM. PROC. art. 15.17(a) (requiring magistrate to appoint counsel according to the timeframes set in TEX. CODE CRIM. PROC. art. 1.051); TEX. CODE CRIM. PROC. art. 1.051(c) (spelling out timeframe for appointment of counsel by county population size).

<sup>31</sup> TEX. CODE CRIM. PROC. art. 15.17(a).

**REQUIREMENT 2: DETERMINE INDIGENCE ACCORDING TO STANDARDS  
DIRECTED BY THE INDIGENT DEFENSE PLAN.**

- ☒ Provide detailed procedures used to determine whether a defendant is indigent.<sup>32</sup>
- ☒ State the financial standard(s) to determine whether a defendant is indigent.<sup>33</sup>
- ☒ List factors the court will consider when determining whether a defendant is indigent.<sup>34</sup>

**REQUIREMENT 3: ESTABLISH MINIMUM ATTORNEY QUALIFICATIONS.**

- ☒ Establish objective qualification standards for attorneys to be on an appointment list.<sup>35</sup>
  - Standards must require attorneys to complete at least six hours of continuing legal education pertaining to criminal / juvenile law during each 12-month reporting period or be currently certified in criminal law by the Texas Board of Legal Specialization.<sup>36</sup>
  - Standards must require attorneys to submit by October 15 each year the percentage of the attorney's practice time dedicated to indigent defense based on criminal and juvenile appointments accepted in this county. The report must be made on a form prescribed by the Texas Indigent Defense Commission for the prior 12 months that begins on October 1 and ends on September 30.<sup>37</sup>

**REQUIREMENT 4: APPOINT COUNSEL PROMPTLY (ADULTS).**

- ☐ Incarcerated persons: After receipt of a request for counsel, counsel must be appointed within one working day in counties with a population of 250,000 or more and within three working days in counties under 250,000.<sup>38</sup>

**REQUIREMENT NOT SATISFIED:** The percent of timely appointments did not meet the TIDC's 90% threshold for presuming a jurisdiction's appointment system to be timely.

- ☐ Persons out of custody: Counsel must be appointed at the defendant's first court appearance or when adversarial judicial proceedings are initiated, whichever comes first.<sup>39</sup>

**REQUIREMENT NOT SATISFIED:** The percent of timely appointments did not meet the TIDC's 90% threshold for presuming a jurisdiction's appointment system to be timely.

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<sup>32</sup> TEX. CODE CRIM. PROC. art. 26.04(l)–(r).

<sup>33</sup> TEX. CODE CRIM. PROC. art. 26.04(l).

<sup>34</sup> TEX. CODE CRIM. PROC. art. 26.04(m).

<sup>35</sup> TEX. CODE CRIM. PROC. art. 26.04(d).

<sup>36</sup> Title 1 TEX. ADMIN. CODE § 174.1–.4.

<sup>37</sup> TEX. CODE CRIM. PROC. art. 26.04(j)(4).

<sup>38</sup> TEX. CODE CRIM. PROC. art. 1.051(c).

<sup>39</sup> TEX. CODE CRIM. PROC. art. 1.051(j); *see also Rothgery v. Gillespie Cnty.*, 554 U.S. 191, 212 – 13 (2008) (holding that “a criminal defendant's initial appearance before a judicial officer, where he learns the charge against him and his liberty is subject to restriction, marks the start of adversary judicial proceedings that trigger attachment of the Sixth Amendment right to counsel.”).

- All unrepresented defendants must be advised of the right to counsel and the procedures for obtaining counsel.<sup>40</sup>

**REQUIREMENT NOT SATISFIED:** Samples from the case review included misdemeanor defendants who waived their right to counsel without the court ruling on their counsel requests.

**REQUIREMENT 4: APPOINT COUNSEL PROMPTLY (JUVENILES).**

- ☒ Unless the court finds that the appointment of counsel is not feasible due to exigent circumstances, the court shall appoint counsel within a reasonable time before the first detention hearing is held to represent the child at that hearing.<sup>41</sup>
- ☒ If the child was not detained, an attorney must be appointed on or before the fifth working day after the date the petition for adjudication, motion to modify, or discretionary transfer hearing was served on the child.<sup>42</sup>

**REQUIREMENT 5: INSTITUTE A FAIR, NEUTRAL, AND NONDISCRIMINATORY ATTORNEY SELECTION PROCESS.**

- ☒ Rotational method: The court must appoint an attorney from among the next five names on the appointment list in the order in which the attorneys' names appear on the list, unless the court makes a finding of good cause on the record for appointing an attorney out of order.<sup>43</sup>
- Public Defender: The system must meet the requirements set out in Article 26.044 of the Code of Criminal Procedure. The appointment process must be listed in the indigent defense plan.<sup>44</sup>

**NOT APPLICABLE:** Jim Wells County uses a rotational system of appointment.
- Alternative appointment method:<sup>45</sup>
  - The local processes must be established by a vote of two-thirds of the judges.
  - The plan must be approved by the presiding judge of the administrative judicial region.
  - The courts must allocate appointments reasonably and impartially among qualified attorneys.

**NOT APPLICABLE:** Jim Wells County uses a rotational system of appointment.

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<sup>40</sup> TEX. CODE CRIM. PROC. art. 1.051(f-2).

<sup>41</sup> TEX. FAM. CODE § 54.01(b-1). TEX. FAM. CODE § 51.10(c).

<sup>42</sup> TEX. FAM. CODE § 51.101(d).

<sup>43</sup> TEX. CODE CRIM. PROC. art. 26.04(a).

<sup>44</sup> TEX. CODE CRIM. PROC. art. 26.044.

<sup>45</sup> TEX. CODE CRIM. PROC. art. 26.04(g)–(h).

## **REQUIREMENT 6: STATUTORY DATA REPORTING.**

- The county auditor shall prepare and send to OCA an annual report of legal services provided in the county to indigent defendants during the fiscal year and an analysis of the amount expended:
  - In each district, statutory county, and appellate court;
  - In cases for which a private attorney is appointed for an indigent defendant;
  - In cases for which a public defender is appointed for an indigent defendant;
  - In cases for which counsel is appointed for an indigent juvenile; and
  - For investigation expenses, expert witness expenses, or other litigation expenses.<sup>46</sup>

**NOT APPLICABLE:** The fiscal monitor addressed this requirement in her report.

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<sup>46</sup> TEX. GOV'T CODE § 79.036(a-1).